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AUG 9 - 2005

No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,
v.
RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT RELIANT ENERGY SERVICES IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether petitioner Powerex Corporation is an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1603(b)(2).

LIST OF PARTIES

Reliant adopts the list of parties set forth in the petition as if set forth fully herein.

RULE 29.6 STATEMENT

Reliant Energy Services, Inc. is a wholly-owned subsidiary of Reliant Energy, Inc., a publicly traded company. No publicly held company owns 10% or more of the stock of Reliant Energy, Inc.

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Respondent Reliant Energy Services, Inc. ("Reliant") respectfully submits this brief in support of the Petition for a Writ of Certiorari filed by Powerex Corp. ("Powerex").

OPINIONS BELOW

The district court's opinion (Pet. App. 18a-44a) is unreported. The court of appeals' opinion (Pet. App. 1a-17a) is reported at 391 F.3d at 1011.

JURISDICTION

The court of appeals entered its judgment on December 8, 2004, and denied rehearing on March 3, 2005. Pet. App. 45a. On May 23, 2005, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 1, 2005. On June 22, 2005, Justice O'Connor further

extended the time to and including July 15, 2005, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions, including 28 U.S.C. §§ 1441, 1447, and portions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a), (b), are set forth in the Appendix at 1a-3a.

STATEMENT

For present purposes, Reliant adopts Powerex's statement of the case. Reliant, however, adds as follows:

1. The named plaintiffs brought this lawsuit on behalf of a putative class that includes certain retail electric customers in California in 2000 and 2001. Plaintiffs allege that Reliant and certain other defendants "combin[ed] to withhold supply from electricity markets and collud[ed] to fix electricity prices," in violation of California's antitrust and unfair competition laws, and that their conduct caused what has become known as the California energy crisis of 2000-2001.

The complaint, however, named only a small number of the many entities that participated in California wholesale electric markets during the relevant period. Public and private power companies throughout 13 western states, Canada, and Mexico traded and supplied power through the interconnected transmission grid that services California, and they continue to do so today. Sellers include traders, independent generators (such as Reliant), and numerous public entities—domestic and international—including municipal utility districts, public irrigation districts, and federal and state agencies.

According to the complaint, the unlawful conduct occurred in markets operated by the California Power Exchange ("PX") and the California Independent System Operator ("ISO"). Under the PX and ISO tariffs filed with

the Federal Energy Regulatory Commission, Reliant and the other market participants did not set the prices at which they sold wholesale power. Rather, the PX or ISO set a single "market clearing price" or "MCP" based on the "highest accepted offer to sell" for a particular timeframe. In general, the MCP applied to all sellers, regardless of the bids.

Because of that structure, the MCP was often set by market participants other than the ones named as defendants in the original complaint. Indeed, the bids of numerous entities trading in the California electricity markets factored into the MCP in precisely the same manner as the bids of Reliant and the other parties that plaintiffs named as defendants. Yet the plaintiffs omitted most of those entities from their complaint.

2. Reliant denies that it violated any state antitrust or unfair competition law,[1] and has set forth additional defenses, including preemption under the Federal Power Act and the filed rate doctrine.[2] Nonetheless, because many entities other than the ones named in plaintiffs' lawsuit had participated in the market in the same manner as Reliant and the other original defendants, and because many could be held liable to the same extent as Reliant under plaintiffs' theories, Reliant cross-complained against other major participants in the California markets, including Powerex.

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[1] Reliant believes that California's energy crisis was caused by a variety of factors, including the State's decision to have wholesale energy prices determined in volatile short-term bid markets with single market clearing prices.

[2] Claims like plaintiffs' consistently have been dismissed on preemption and filed-rate grounds. See *California ex rel. Lockyer* v. *Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004), cert. denied, 125 S. Ct. 1836 (2005); *Public Util. Dist. No. 1 of Grays Harbor Washington* v. *Idacorp, Inc.*, 379 F.3d 641 (9th Cir. 2004); and *Public Util. Dist. No. 1 of Snohomish County* v. *Dynegy Power Mktg., Inc.*, 384 F.3d 756 (9th Cir. 2004), cert. denied, 125 S. Ct. 2957 (2005).

Powerex and several other cross-defendants (*e.g.*, BC Hydro and the Bonneville Power Administration), in turn, removed the case to federal court. Plaintiffs moved for a remand to state court. The district court held that the case was properly removed in the first instance because many of the removing cross-defendants were governmental entities entitled to removal under 28 U.S.C. §§ 1441, 1442. It also granted the motions of several cross-defendants for dismissal on (for example) sovereign immunity grounds. The district court then remanded the case—including the claims against Powerex—to state court, and the Ninth Circuit affirmed. Powerex, those courts held, is not "an organ" of the provincial government of British Columbia entitled to insist on a federal forum under the Foreign Sovereign Immunities Act and 28 U.S.C. § 1441(d). For the reasons stated below, Reliant agrees with Powerex that the district court and Ninth Circuit erred, and that the issue warrants this Court's review.

REASONS FOR GRANTING THE PETITION

Enacted in 1976, the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602, *et seq.*) establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA broadly defines "foreign state" as including both a sovereign nation and any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The phrase "agency or instrumentality" includes entities that are separate legal persons from the state (*e.g.*, corporations) if they are "an organ of a foreign state" and they meet certain further requirements. *See* 28 U.S.C. § 1603(b)(1)-(3).

Whether or not an entity qualifies as an "organ" of a foreign state is often a critical question—not merely for

individual litigants, but also for foreign governments and the federal courts. Under the FSIA, organs of foreign states are subject to suit only under specified circumstances and are entitled to special protections. See, *e.g.*, 28 U.S.C. §§ 1604, 1605, 1607. Of particular importance here, foreign sovereigns are entitled to remove and have their cases heard in federal rather than state court. See 28 U.S.C. § 1441(d).

In this case, the Ninth Circuit concluded that Powerex was not an "organ" of the provincial government of British Columbia and thus not a "foreign state" within the meaning of the FSIA. Accordingly, it held that the claims against Powerex were properly remanded to state court. Reliant agrees with Powerex's contention (Pet. 18-24) that the test articulated and applied by the Ninth Circuit for determining Powerex's status under the FSIA differs from the more comprehensive, fact-sensitive tests employed by the Second, Third and Fifth Circuits, and that the Ninth Circuit's test is contrary to Congress's intent in enacting the FSIA. The Ninth Circuit's decision, moreover, introduces considerable uncertainty into this area of law. Its cramped view of what constitutes "an organ" improperly strips foreign states of their right to a federal forum. Throughout the territory of the Ninth Circuit, foreign sovereigns now risk losing the benefits of the FSIA unless they conform the characteristics of their commercial enterprises to the peculiar test the Ninth Circuit has now articulated.

Foreign sovereigns often participate in commerce in the United States through indirect instrumentalities. The uncertainty created by this decision discourages interstate and foreign trade by those entities and increases the risks involved in, and thus the costs of, any trading that does occur. Reliant continues to trade regularly with entities that should rightly be considered organs under the FSIA, including Canadian entities such as Powerex and Hydro-Quebec. During the period from January 1, 2004 through

July 26, 2005, for example, Reliant entered into over 1,000 separate power purchase or sale transactions with Powerex alone. Reliant sold over 66,000 megawatt hours of electric energy to Powerex, while purchasing over 500,000 megawatt hours, with a notional value of nearly $30.5 million. Although the value of these transactions is itself significant, they represent a relatively small portion of the total power trades in which Powerex is a party.

This Court should grant the petition for a writ of certiorari to ensure that the approach to foreign sovereigns set forth in the FSIA is uniformly followed in the federal courts. Foreign sovereign entities must be secure in their rights with respect to potential litigation in the United States so that they will be willing to continue to conduct business in and provide critical resources to United States markets. Reliant and other domestic companies engaged in trade with entities created by foreign sovereigns also benefit from the certain and predictable application of the FSIA. The Ninth Circuit's decision here creates uncertainty and undermines the goal of foreign participation in United States markets.[3]

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[3] The Ninth Circuit correctly rejected plaintiffs' contention that 28 U.S.C. § 1447(d) deprived that court of jurisdiction. Pet. App. 9a-10a. Section 1447(d) states that an "order remanding a case to the State court from which it is removed is not reviewable on appeal or otherwise * * * ." In *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345 (1976), this Court held that Section 1447(d) "must be construed together" with Section 1447(c), which specifies when certain remands are permitted ("on the basis of any defect other than lack of subject matter jurisdiction" on motion filed within 30 days, and "at any time before final judgment" if "it appears that the district court lacks subject matter jurisdiction"). Reading Section 1447(c) and (d) "*in pari materia*," *Thermtron* held that "*only* remand orders issued under § 1447(c) and invoking the specified grounds therein—that removal was improvident" or that the district court was "without jurisdiction"—are immune from review under § 1447(d). *Thermtron*, 423 U.S. at 346. Accord, *Things Remem-*

CONCLUSION

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

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bered, Inc. v. *Petrarca*, 516 U.S. 124, 127 (1995) (Section "1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)."); *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 711-712 (1996) (same). Here, as in *Thermtron*, Section 1447(d) does not preclude appellate review because the district court did *not* remand based on grounds set forth in Section 1447(c). Removal did not suffer from procedural defects; it is undisputed that (at a minimum) BC Hydro was statutorily entitled to remove the *entire* case—including all defendants—under 28 U.S.C. 1441(d), while the Bonneville Power Administration and Western Power Administration were entitled to do so under 28 U.S.C. § 1442. Nor did the district court "lack jurisdiction." It simply remanded what was left of the case once it resolved the federal issues. See *Kircher* v. *Putnam Funds Trust*, 373 F.3d 847, 850-851 (7th Cir. 2004). This Court has reviewed an analogous remand decision, *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988) (reviewing decision remanding pendent state claims under *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), after resolution of federal issues), and the federal courts regularly hold that such remands fall outside § 1447(c), (d), and are reviewable as a result, see *Bogle* v. *Phillips Petroleum Co.*, 24 F.3d 758, 761 (5th Cir. 1994); *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994) (*per curiam*).

RESPECTFULLY SUBMITTED.

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AUGUST 8, 2005

APPENDIX

STATUTORY APPENDIX

1. Section 1441 of Title 28 of the United States Code provides in relevant part:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations

of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * * * *

2. Section 1447 of Title 28 of the United States Code provides in relevant part:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter

jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

3. The Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602, *et seq.*), provides in relevant part:

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

* * * * *